Nos. 83-812 and 83-929

Office - Supreme Court, U.S
FILED
SEP 4 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALLACE, et al., *Appellants,*

—v.—

JAFFREE, et al., *Appellees.*

SMITH, et al., *Appellants,*

—v.—

JAFFREE, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ALABAMA CIVIL LIBERTIES UNION AND THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

JOHN SEXTON
New York University
Law School
40 Washington Square South
New York, New York 10012
(212) 598-3450

NATHAN Z. DERSHOWITZ
National Coalition for Public
Education and Religious Liberty
Dershowitz and Eiger
225 Broadway
New York, New York 10007
(212) 513-7676

JACK D. NOVIK
(Counsel of Record)
BURT NEUBORNE
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

EDWARD STILL
Alabama Civil Liberties Union
Suite 400, Commerce Center
2027 First Avenue N.
Birmingham, Alabama 35203
(205) 322-6631

Counsel for Amici

BEST AVAILABLE COPY

QUESTION PRESENTED

WHETHER THE ALABAMA MEDITATION-OR-PRAYER STATUTE VIOLATES THE ESTABLISHMENT CLAUSE INASMUCH AS IT WAS ENACTED WITH A RELIGIOUS PURPOSE, WILL HAVE A RELIGIOUS EFFECT AND ITS RELIGIOUS DESIGN DOES NOT "ACCOMMODATE" ANY BURDEN ON THE FREE EXERCISE OF RELIGION.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

STATEMENT OF CASE 2

A. THE MEDITATION-OR-PRAYER STATUTE 4

B. PUBLIC SCHOOL RELIGIOUS PRACTICES 11

C. THE SCHOOL PRAYER STATUTE.....14

SUMMARY OF ARGUMENT 16

I. THE ALABAMA MEDITATION-OR-PRAYER STATUTE WAS ENACTED SPECIFICALLY TO PROMOTE RELIGIOUS PRACTICES IN ALABAMA PUBLIC SCHOOLS, WHERE THERE EXIST NO STATE IMPOSED IMPEDIMENTS TO PRIVATE INDIVIDUAL DEVOTIONAL INTROSPECTION OR PRAYER, AND THEREFORE THE MEDITATION-OR- PRAYER STATUTE IS NOT A PERMISSIBLE "ACCOMMODATION," BUT RATHER AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION 21

A. INTRODUCTION 21

B. THE ACCOMMODATION DOCTRINE STRIKES THE BALANCE BETWEEN CONFLICTING TENSIONS OF THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT 23

C. THE ALABAMA MEDITATION-OR-PRAYER STATUTE IS DESIGNED TO ADVANCE A RELIGIOUS PRACTICE, DESPITE THE LACK OF ANY IMPEDIMENT TO THE FREE EXERCISE OF THAT RELIGIOUS PRACTICE 36

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE ALABAMA MEDITATION-OR-PRAYER STATUTE VIOLATES THE ESTABLISHMENT CLAUSE 42

A. THE PURPOSE OF THE ALABAMA MEDITATION-OR-PRAYER STATUTE WAS TO ADVANCE, AND EXPRESS ENDORSEMENT OF, RELIGION 44

B. THE EFFECT OF THE ALABAMA MEDITATION-OR-PRAYER STATUTE WILL BE TO ADVANCE RELIGION 52

CONCLUSION.....61

TABLE OF AUTHORITIES

CASES

City of Akron v. Akron Center for Reproductive Rights, ___ U.S. ___ (1983).....29

Engel v. Vitale, 370 U.S. 421 (1962).....29,31,33,42

Estate of Thornton v. Caldor, Inc., cert. granted, No. 83-1158 (Mar. 5, 1984) 17

Everson v. Board of Education, 330 U.S. 1 (1946) 32,33,34,52

Jaffree v. Board of School Commissioners, 554 F.Supp. 1104 (S.D. Ala.), rev'd, 705 F.2d 1526 (11th Cir. 1983), cert. denied, ___ U.S. ___ (1984) 9,13,14

Jaffree v. James, 554 F.Supp. 727 (S.D. Ala. 1982) 9,50

Jaffree v. James, 554 F.Supp 1130 (S.D. Ala.), rev'd, 705 F.2d 1526 (11th Cir. 1983), aff'd mem. in part and prob. juris. noted in part, ___ U.S. ___ (1984) ...9,11,12,16,50

Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 455 U.S. 913 (1982).....31,42

Lemon v. Kurtzman, 403 U.S. 602 (1971).....28,31,33,43,44,52

Lynch v. Donnelly, ___ U.S. ___ (1984).....33,44,51,52,60

McCollum v. Board of Education, 333 U.S. 203 (1948) 27,42,43

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 28

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 8,29,30,42,43,45

Sherbert v. Verner, 374 U.S. 398 (1963) 24,25,26,27,37

Stone v. Graham, 449 U.S. 39 (1980) 44,45

Thomas v. Review Board, 450 U.S. 707 (1981) 24,25,26

United States v. Seeger, 380 U.S. 163 (1965) 24

Walz v. Tax Commission, 397 U.S. 664 (1976) 34,35

Wisconsin v. Yoder, 406 U.S. 205 (1972) 24,26,37

Wolman v. Walter, 433 U.S. 229 (1977) 32

Zorach v. Clausen, 343 U.S. 306 (1952) 27,41

OTHER AUTHORITIES

Ala. Code § 16-1-20 .....passim

Ala. Code § 16-1-20.1 .....passim

Ala. Code § 16-1-20.2.....8,14,55

42 U.S.C. § 2000e.....17

Rule 25, Fed. R. Civ. P.....39

Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N.Y.U.L.R. 364 (1983) ..44,45

Note, The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools, 96 Harv.L.R. 1874 (1983) 40,49,57

Birmingham Post-Herald 15,16,56

Montgomery Advertiser 15

INTEREST OF AMICI [1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The Alabama Civil Liberties Union is the Alabama affiliate of the ACLU. The ACLU and its affiliates are committed to protecting both the individual freedom to worship and the principle of government neutrality in matters of religion embodied in the two Religion Clauses of the First Amendment. The ACLU and its affiliates have been involved either directly, or as amicus, in many of the leading First Amendment Religion Clause cases in this Court and throughout the country.

The National Coalition for Public Education and Religious Liberty is a national

---

[1] The written consent of all parties to the filing of this brief has been submitted to the Clerk.

coalition of organizations sharing the common objectives of preserving religious freedom and the separation of church and state in public education.[2/]

STATEMENT OF THE CASE

This lawsuit -- which began as a challenge to the pervasive religious practices in Alabama public schools -- has been nar-

---

[2/] The consitutuents of National PEARL are: American Association of School Administrators; American Civil Liberties Union; ACLU National Capital Area; ACLU of Connecticut; American Ethical Union; American Federation of Teachers, AFL-CIO; American Humanist Association; American Jewish Congress; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League of B'nai B'rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Michigan Council About Parochiaid; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochiaid; National Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Women's Conference; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; Unitarian Universalist Association.

rowed on appeal to only one issue: the constitutionality of Ala. Code, § 16-1-20.1, Alabama's "Meditation-or-Prayer Statute."

However, although that legal question now stands alone, it cannot be decided in isolation from the factual circumstances of this case in its entirety. That complete factual record reflects the purposes and effects of the Meditation-or-Prayer Statute as it was actually promulgated and perceived in Alabama, and not as some other statute might have been enacted in idealized circumstances.[3/]

[3/] The appellants, and the United States as amicus, seek to transform this case from a narrow review of the Alabama Meditation-or-Prayer Statute, with its unique factual history and evidentiary record, into a comprehensive ruling encompassing all state statutes providing for a minute of silence regardless of history or circumstances. Brief of Appellant George Wallace (hereinafter "Br. of Gov. Wallace"), at 14, Brief of the United States as Amicus Curiae Supporting Appellants, (hereinafter "Br. of U.S."), at 12, et seq. However, appellees have limited their argument, as do amici, to the sole contention that when the Alabama statute is measured against ap-
(footnote continued)

A. THE MEDITATION-OR-PRAYER STATUTE

The Alabama Meditation-or-Prayer Statute[4] was enacted in 1981. However, that statute is not the only Alabama legislation concerning silence in public school classrooms: In 1978, Alabama enacted Ala. Code § 16-1-20, a "Meditation Statute" providing solely for silent meditation, without any mention of prayer.[5]

---

propriate constitutional standards it should be adjudged to violate the Establishment Clause. The constitutionality of other minute-of-silence statutes can be assessed only in the context of the factual circumstances in which they are enacted and applied.

[4] The Meditation-or-Prayer Statute provides, in its entirety, as follows:

"At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

[5] That Meditation Statute provides, in its entirety, as follows:

"At the commencement of the first class each day in the first through the sixth grades in all (footnote continued)

The plaintiffs -- who had first initiated this action to enjoin the vocal, group prayer activities conducted by public school teachers in Mobile County, Alabama (see discussion infra) -- challenged the constitutionality of the Meditation-or-Prayer Statute in their Second Amended Complaint (J.A. 21). In response, Governor James' Answer (J.A. 37)[6] admitted the following relevant facts:

-that the legislature enacted the Meditation-or-Prayer Statute to "clarify its intent to have prayer as part of the daily classroom activity;"[7]

---

public schools, th teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."

[6] The other defendants named in the Second Amended Complaint denied all of its material allegations (J.A. 30).

[7] Compare, Second Amended Complaint, ¶32(d)(J.A. 24-5), with Governor's Answer to ¶32(d)(J.A. 40).

-that the "expressed legislative purpose in enacting Section 16-1-20.1 (1981)[the Meditation-or-Prayer Statute] was to 'return voluntary prayer to (Alabama's) public schools;'"[8]

-that the teacher defendants "have led their classes in prayer pursuant to the authority of God...as well as Alabama Code § 16-1-20 [the Meditation Statute]" [9], and the Governor makes substantially the same admission as to the Meditation-or-Prayer Statute.[10]

The meaning and purpose of the Meditation-or-Prayer Statute were further illuminated by its legislative sponsor, Senator Donald Holmes, who inserted in the legislative record, without objection, a Statement which is part of the legislative history of the statute. That Statement articulates only one reason for the Meditation-or-Prayer

---

[8] Compare, Second Amended Complaint, ¶32(e)(J.A. 25), with Governor's Answer to ¶32(e)(J.A. 40).

[9] Compare, Second Amended Complaint, ¶¶32(b) and (c)(J.A. 24), with Governor's Answer to ¶¶32(b) and (c)(J.A. 40).

[10] Compare, Second Amended Complaint, ¶¶32(f) and (g)(J.A. 25), with Governor's Answer to ¶¶32(f) and (g)(J.A. 40).

Statute: to reintroduce prayer, and promote religion, in the public schools.[11]/

The legislative purpose of the Meditation-or-Prayer Statute can be further discerned from the testimony of Senator Holmes at the preliminary injunction hearing (J.A. 43, et seq.). He explained that he wrote and sponsored that statute because, at the time, "all we had was a silent meditation law on the books" and he wanted to get "voluntary prayer" back in the schools (J.A. 48

---

[11]/ In pertinent part, Senator Holmes stated:

"Gentlemen, by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God. I believe this effort to return voluntary prayer to our public schools for its return to us to the original position of the writers of the Constitution, this local philosophies and beliefs hundreds of Alabamians have urged my continuous support for permitting school prayer [sic]. Since coming to the Alabama Senate I have worked hard on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber" (J.A. 50).

and 51).[12] Moreover, after conceding that explicitly religious purpose, Senator Holmes also admitted that he had no secular purposes for the statute.[13]

After hearing that evidence, and in the absence of any contrary proof of purpose by

---

[12] The phrase "voluntary prayer" has long been used by proponents of public school religious practices to mean in-school, government-initiated, vocal group prayer of precisely the sort which this court held violated the Establishment Clause. School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

Thus, in context, it is clear Senator Holmes intended "voluntary prayer" to mean vocal teacher-led group prayer such as existed when the Senator was in school: "I had prayer in school when I was in the Sixth Grade. I still have my Sixth Grade Bible that my teacher gave me" (J.A. 48.). Similarly, the Senator characterized Ala. Code §16-1-20.2 (which provided for such vocal, group prayer activities in the public school), as the "Voluntary Prayer Bill," and described it as providing only for "voluntary prayer in our public schools" (J.A. 46).

[13] Senator Holmes testified as follows:

"Q Did you have any non-religious or secular purpose for proposing this particular bill, Senate Bill Sixteen, the 1981 bill [Ala. Code 16-1-20.1]? ....

A [Senator Holmes] No, I did not have no other purpose in mind [sic]" (J.A. 51-52).

the defendants, the district court made the factual finding that "[t]he enactment of ... §16-1-20.1 [the Meditation-or-Prayer Statute] is an effort on the part of the State of Alabama to encourage a religious activity," Jaffree v. James, 544 F.Supp. 727, 732 (S.D. Ala. 1982), and it preliminarily enjoined the statute.

The district court later dismissed plaintiffs' case,[14] but the Court of Appeals unanimously rejected the district court's analysis and concluded that the Meditation-or-Prayer Statute violated the Establishment Clause. Jaffree v. Wallace, 705 F.2d 1526, 1535-36 (11th Cir. 1983).[15]

---

[14] The district court decision was based on the long discredited contention that the First Amendment does not prohibit a State establishment of religion and, in any event, the Fourteenth Amendment does not incorporate First Amendment prohibitions against the states. Jaffree v. James, 554 F.Supp. 1130 (S.D. Ala. 1983), incorporating by reference, Jaffree v. Board of School Commissioners, 554 F.Supp. 1104 (S.D. Ala. 1983).

[15] Four judges later dissented from the denial of (footnote continued)

That Court of Appeals decision quotes, and relies on, the record of the district court proceedings "where it was established that the intent of the statute was to return prayer to the public schools," id., at 1535, and the district court finding of fact that the objective of the statute "was ... the advancement of religion." Id. The decision also recognizes that the difference between the Meditation Statute and the later enacted Meditation-or-Prayer Statute further supports the factual conclusion that the Meditation-or-Prayer Statute was enacted for religious purposes: "... the inclusion of prayer obviously involves the state in religious activity." Id.

Thus, when all that evidence was considered, along with the absence of any con-

---

the petition for rehearing en banc as to the Meditation-or-Prayer Statute. Jaffree v. Wallace, 713 F.2d 614 (11th Cir. 1983).

trary evidence, the court found "a lack of secular legislative purpose on the part of the Alabama Legislature" and that "the statute has the primary effect of advancing religion." Id. The Court of Appeals decision was brief (see, Br. of U.S., at 20) because the relevant factual findings left little need for extended discussion.

The defendants appealed, and this Court noted probable jurisdiction. ___ U.S. ___ (1984).

B. PUBLIC SCHOOL RELIGIOUS PRACTICES

Ishmael Jaffree sends his three children to the public schools in Mobile County, Alabama, where vocal, Christian religious practices have been routinely conducted by teachers in the classroom.[16] Despite Jaf-

---

[16] The evidence presented at trial established that public school teachers led their classes in daily devotionals consisting of the public recitation of the Lord's Prayer, and other religious, particularly Christian, songs and prayers. See e.g., 544 F.Supp., at 1106-8, and 705 F.2d, at 1528-29.

free's repeated complaints that such religious practices were offensive to him as a matter of his own conscience, his children's teachers and the supervisory public school officials ignored Jaffree's requests that such religious activities be terminated.

Because of their indifference to the plaintiff's beliefs and religious preferences, and flagrant disregard of school board policy regarding religious instruction,[17] the Jaffree children were compelled to endure the ostracism of their classmates

---

[17] The policy on religious instruction adopted by the Board of School Commissioners of Mobile County -- which is not even particularly stringent -- provides as follows:

"RELIGIOUS INSTRUCTION

Schools shall comply with all existing state and federal laws as these laws pertain to religious practices and the teaching of religion. This policy shall not be interpreted to prohibit teaching about the various religions of the world, the influence of the Judeo-Christian faith on our society, and the values and ideals of the American way of life." Quoted by the district court, 554 F.Supp., at 1108.

and the offensive religious indocrination of their teachers. (See, the Verified Complaint, J.A. 3, as twice amended, J.A. 17 and 21.) Jaffree was forced to bring suit to enjoin those religious practices, and for damages.

After preliminary proceedings and full trial on the merits, the district court dismissed the complaint on the grounds that this Court was wrong in concluding that public school prayer activities violated the Establishment Clause, and that the Court was also wrong that the First Amendment prohibitions were applicable to the states. 544 F.Supp. 1104. On appeal to the Eleventh Circuit, the reasoning of the district court decision was unanimously reversed, and the Mobile County public school religious practices were declared unconstitutional, 705 F.2d 1526. This Court declined to review that decision. ___ U.S. ___ (1984).

C. THE SCHOOL PRAYER STATUTE

In 1982, the Alabama legislature enacted a statute providing that any teacher or school, "recognizing that the Lord God is one," at the beginning of any public school class, may engage in any prayer activities or, alternatively, lead students in a specific prayer recited in the statute. Ala. Code §16-1-20.2.[18] That "School Prayer Statute" was promoted by then Governor Fob James (whose son composed the statutory

---

[18] The full text of the School Prayer Statute is as follows:

"From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of the Lord. Amen."

prayer) and enacted with much public fanfare as a means of repudiating the Establishment Clause prohibitions articulated by this Court. See e.g., Birmingham Post-Herald, July 13, 1982; Montgomery Advertiser, July 13, 1982.

Moreover, after the district court preliminarily enjoined any implementation of that statute, 544 F.Supp. 727, Governor James publicly urged Alabama school officials and teachers to "ignore this federal court injunction" and to "proceed with prayer in the classroom."[19] In fact, the Governor went so far as to "dare" the federal courts to take any action against

---

[19] The Governor was quoted as saying:

"I am today encouraging all Alabama school officials, as well as the people of Alabama, to stand on their constitutional rights, to ignore this federal court injunction and to proceed with prayer in the classrooms, with blessings at mealtime and with any other heart-felt prayer which the citizens of Alabama may wish to say." Birmingham Post-Herald, September 27, 1982.

his flagrant contempt, and he promised state support to educators if they should be fined or held in contempt. Birmingham Post-Herald, September 16, 1982.

Despite that flagrant disdain for the Constitution and the courts expressed by the highest officials of Alabama, and despite the clear, binding precedent of this Court, the district court later dismissed the challenge to the School Prayer Statute for the same reasons described supra. 544 F.Supp. 1130. Both the reasoning and the holding of that district court decision were later unanimously reversed by the Eleventh Circuit, 705 F.2d 1526, and that Court of Appeals decision was summarily affirmed by this Court. ___ U.S. ___ (1984).

SUMMARY OF ARGUMENT

I. ACCOMMODATION

The doctrine of accommodation is

properly invoked only when the free exercise of an individual's religion is burdened by the government in the legitimate conduct of its business.[20] Although accommodation then works to accord religious practice special treatment, it is justified because undertaken for the limited purpose of assuring that a person fares no worse for being religious than a non-religious person sub-

---

[20] Private, as opposed to government, action may also create a burden on the free exercise of religion. The doctrine of accommodation may then, similarly, permit the state, consistently with the dual dictates of the Religion Clauses, to assure that free excercise values are protected. For example, the "religious accommodation" provisions of Title VII, 42 U.S.C § 2000e, constitutionally protect free exercise values from unreasonable burdens imposed in the private employment context. See also, Estate of Thornton v Caldor, Inc., cert. granted, No. 83-1158 (March 5, 1984) and Br. of American Civil Liberties Union, et al., as Amicus in Support of Petitioner, at 7-20. However, whether accommodation is mandatory or permissive, and whether it operates in the public or private sector, it must always be triggered by a burden to the free exercise of religion.

Inasmuch as this case does not involve any alleged private burdens to religious practice, this brief will focus exclusively on accommodation as it applies in the context of governmental affairs.

ject to the same government regulation. Thus, accommodation, in the sense of that tolerant reconciliation of competing constitutional interests, best reflects the multiple values embodied in the Religion Clauses of the First Amendment.

However, when the government reaches out to assist religious practices not otherwise threatened by any impediment, then it has embraced religion as an official government policy. To call that "accommodation" would provide the government license to abandon its posture of neutrality towards religion in contravention of the great wisdom codified in the Establishment Clause.

In this case, prior to enactment of the Meditation-or-Prayer Statute, Alabama public school students did not suffer any impediment to their right to the free exercise of silent prayer. And Alabama enacted the Meditation-or-Prayer Statute,

not to assure neutrality by relieving a burden on religion, but rather to circumvent the constitutional requirement of religious neutrality.

II. PURPOSE AND EFFECT

The limitations on governmental advancement, endorsement and promotion of religions are nowhere more important, nor more rigorously enforced, than in our nation's public schools. Given the youth, and the mandatory presence, of students in the public schools, they are particularly vulnerable to majoritarian pressures for religious conformity, as well as the scorn and ostracism inflicted on the nonconformist. The resulting conflict, divisiveness and alienation thoroughly undermine the educational mission of the public schools, and engender precisely that sectarian factionalism in the community that the Establishment Clause was designed to avoid.

In this case, the evidence is overwhelming that the Alabama Meditation-or-Prayer Statute was enacted for explicitly religious purposes. It was designed specifically to announce that Alabama has once again put religion into its public school school classrooms as a matter of official government policy.

Furthermore, the religious purposes of the statute -- which were widely proclaimed by Alabama officials -- will necessarily occasion religious effects in Alabama public school classrooms. Even in the best of circumstances, it would be difficult enough for a teacher to announce and implement a period of silence for meditation or prayer with the neutrality and the respect for diversity that appellants concede is constitutionally required. However, when the government itself interjects the politics of religion into the public schools and conveys

the message that "neutrality" is a mere technicality to be used as a subterfuge for the advancement of religion, then the religious effects the government itself is promoting are certain to occur.

Therefore the statute should be held to violate the First Amendment because of both its religious purpose and effect.

I.

THE ALABAMA MEDITATION-OR-PRAYER STATUTE WAS ENACTED SPECIFICALLY TO PROMOTE RELIGIOUS PRACTICES IN ALABAMA PUBLIC SCHOOLS, WHERE THERE EXIST NO STATE IMPOSED IMPEDIMENTS TO PRIVATE INDIVIDUAL DEVOTIONAL INTROSPECTION OR PRAYER, AND THEREFORE THE MEDITATION-OR- PRAYER STATUTE IS NOT A PERMISSIBLE "ACCOMMODATION," BUT RATHER AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION.

A. INTRODUCTION

"Accommodation" is the conceptual fulcrum of the arguments advanced in support of the Alabama Meditation-or-Prayer Statute.[21/] Properly conceived, the doctrine

of accommodation is a narrowly crafted analytical framework for reconciling real conflicts between Free Exercise and Establishment values. When invoked to that end, accommodation quite properly permits the favored treatment of religion in order to relieve a burden on its free exercise, and to assure that the neutral equality which is the promise of the Religion Clauses is realized, in fact, by even the most religious among us.

The appellants, and their supporting amici, seek to transform accommodation by allowing it to be invoked even in the absence of any impediment to the free exercise of religion. If used in that sense, however, the government favored treatment of religion would not "accommodate" religion, because no rights needing accommodation are

---

21/ See especially, Br. of U.S., at 9-18, and Br. of Gov. Wallace, at 16-30.

infringed. Rather, accommodation then becomes just a pretext for permitting the governmental advancement of religion, and the promotion of particular religious practices such as prayer.

Such a distortion of accommodation doctrine would effect a reversal of long-standing Establishment Clause restraints on governmental endorsement and advancement of religion. It should be rejected by this Court because it would permit an excessive involvement of government and religion, while serving no legitimate secular governmental functions.

B. THE ACCOMMODATION DOCTRINE STRIKES THE BALANCE BETWEEN CONFLICTING TENSIONS OF THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT

The doctrine of accommodation is the constitutional mechanism for resolving the tension between the imperatives of individual religious conscience protected by the Free Exercise Clause, and some conflicting

governmental mandate being applied without regard to religion, as normally demanded by the Establishment Clause. See e.g., Thomas v. Review Board, 450 U.S. 707 (1981), Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972), and United States v. Seeger, 380 U.S. 163 (1965).

Thus, accommodation exempts an individual invoking sincere religious scruples from a government rule of general applicability, when that general rule significantly impairs the free exercise of religion. Such special deference to religious practice is constitutionally fitting -- despite "the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause," Wisconsin v. Yoder, supra, at 220-21 -- only because necessary to overcome a corresponding impediment to religious

exercise created by the government itself.

For example, in Sherbert v. Verner, supra, and Thomas v. Review Board, supra, the state unemployment insurance program was governed, in part, by a general rule that benefits were not available if the employee was voluntarily unavailable for employment. See, Sherbert, supra, at 400-401, and Thomas, supra, at 709. In both cases, the employees were voluntarily unavailable within the meaning of the state program, but only because of the demands of their religious conscience and practice.

To refuse unemployment insurance in those circumstance would be "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith [and] effectively penalizes the free exercise of her constitutional liberties." Sherbert, supra, at 406. Thus, the Court properly

concluded in both cases that the otherwise neutral state program must accommodate the needs of religious dictates by way of an exemption from the general rule. Moreover, although that exemption was "in a sense, a 'benefit' to [the individual] deriving from his religious beliefs," Thomas, supra, at 719, it was not an establishment because it "manifests no more than the tension between the two Religion Clauses ... [and] 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences ...'" Id., at 719-20, quoting Sherbert, supra, at 409.[22/]

22/ The same principle of accommodation was applied in the context of compulsory public education, where a facially neutral state requirement that all children receive schooling until the age of 16, substantially interfered with the religious dictates of the Amish. Wisconsin v. Yoder, supra. There, again, this Court recognized that "[a] regulation neutral on its face may, in it application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Id., at 220. Thus, the Court accommodated the Amish religious needs by providing a limited exemption from the compulsory education (footnote continued)

However, where an individual confronts no interference with the practice of his or her faith, then a government program to promote that faith or facilitate the religious practice cannot be explained as an "accommodation" of competing constitutional interests, because in such a case there are no Free Exercise values abridged. Where an individual is not forced to choose between secular and sectarian authority, a government program specifically designed to promote or advance religious activity necessarily constitutes an establishment of religion, in controvention of longstanding First Amendment principles. For example, although a government-imposed system of compulsory education cannot operate to deprive parents of the power to send their

---

law. Also, compare McCollum v. Board of Education, 333 U.S. 203 (1948), with Zorach v. Clausen, 343 U.S. 306 (1952).

child to a private religious school, Pierce v. Society of Sisters, 268 U.S. 510 (1925), nonetheless a government program to help parents provide their children with that religious education would properly be held to violate the Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602 (1971).

The United States, as amicus, and the appellants, are asking the Court to abandon the logic of that distinction by "unleashing" accommodation. As they would have it, the doctrine would allow a state -- as so euphemistically described by the United States -- to "expand opportunities for voluntary religious exercise" (Br. of U.S., at 12) even if religion is not directly burdened by the government. Their proposed use of accommodation is not controlled by any standards nor subject to any limits; it is a legal conclusion, rather than a constitutional analysis, designed to

sanction governmental endorsements of religion.[23]/

However, that use of "accommodation" effectively trivializes the principles of religious neutrality embodied in the Establishment Clause, because virtually any

---

[23]/ The United States also proposes that the Meditation-or-Prayer Statute should be upheld because many state legislatures have "judged it appropriate" (Br. of U.S., at 23), and that "[h]ow serious is the need" for accommodation is "a question of public policy for legislatures to assess." Id., at 24.

This is not the first time the Solicitor General has asked the Court to abdicate its role as ultimate caretaker of the freedoms contained in the Bill of Rights in deference to the policy judgments of state legislators. See Br. of the United States submitted in City of Akron v. Akron Center for Reproductive Rights, Nos. 81-746 and 81-1623, at 17-19. The Court rejected the government's suggestion in that case, ___ U.S. ___, ___ (1983) as it should here.

Regardless of how serious is the perceived need, the constitutionality of the state's response is not a question of public policy for the various state legislatures, but an issue of fundamental law for this Court to resolve. Thus, for example, even though many states perceived a strong need as a matter of public policy for vocal, group public school prayer (see, Br. of U. S., at 9), the Supreme Court properly concluded that such programs offended the Establishment Clause. See, School District of Abington Township, supra.; Engel v. Vitale 370 U.S. 421 (1962)

government program advancing, sponsoring or promoting religion can be characterized as merely "facilitating opportunities for voluntary religious exercises." One need only examine the cases in which this Court has found Establishment Clause violations, particularly in the public school setting, to appreciate the extent to which such an expansive definition of "accommodation" would be used to undermine Establishment Clause constraints.

In School District of Abington Township v. Schempp, supra, for example, the school prayer practices in question were, in part, defended as merely providing the opportunity for voluntary religious exercises by those who desired to participate, without coercing those who did not. Id., at 313 (Stewart J., dissenting); see also id., at 287-94 (Brennan J., concurring).[24/] Yet the Court properly recognized that public school

prayer exercises put the government into the business of promoting religion, thus breaching its required neutrality where no "accommodation" of free exercise rights was warranted. See also, Engel v. Vitale, supra., at 445 (Stewart J., dissenting); and Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 455 U.S. 913 (1982), where the argument was advanced that the public school prayer program in that case merely promoted religious liberty, and not religion, because it was voluntary and did not prescribe any specific prayer. Id., at 904-905 (Sharp J., dissenting).

Similarly, in Lemon v. Kurtzman, supra, the Court readily acknowledged the value of

---

24/ Indeed, in its brief in this case, the United States virtually concedes that its notion of accommodation could include even vocal group prayer. Thus, it asserts that "the practice of opening the school day with spoken prayer" was a way "to accommodate this belief" that prayer "should be an integral part of all of life's activities, including school ...." Br. of U.S., at 9.

sectarian education and the benificent impulses that led the government to attempt its support. Id., at 625. Yet, even though the programs could easily be described as "simply expand[ing] the freedom available to individuals to decide for themselves, whether and how to engage in religious practice without inducing or coercing that choice" (see, Br. of U.S. in this case, at 15), the Court found an Establishment Clause violation because the resulting entanglement could not be constitutionally justified by a purported need to "accommodate" the desire of many parents to provide their children with a religious education. See also, e.g., Wolman v. Walter, 433 U.S. 229 (1977).25/

25/ To the extent that the Court upheld certain financing provisions in Wolman, and other cases beginning with Everson v. Board of Education, 330 U.S. 1 (1946) it did so by concluding that those provisions did not, in fact, constitute government promotion of religion at all. Thus, those cases provide no support for the appellants' argument here that a government program admittedly advancing religion can be constitutionally acceptable as an (footnote continued)

Moreover, just as the doctrine of accommodation does not permit governmental advancement of religion in the absence of a burden to religious free exercise (see e.g., Engel, Lemon, and discussion supra.), accommodation is also distinguishable from those benefits to religion that are the consequence of religiously neutral government functions such as police and fire protection, for example. See e.g., Everson v. Board of Education, supra., at 17. Similarly, references to, and acknowledgments of, religion that are the negligible consequences of promoting some legitimate secular values such as art, patriotic ritual or a communal day of rest, see e.g., Lynch v. Donnelly, ____ U.S. ____, ____ (1984), are permissible because they do not offend Establishment Clause values. Indeed, in

---

"accommodation," even when not necessary to alleviate a state-created impediment to religion.

Lynch the Court compared the nativity scene display to art, and it was deemed constitutionally inoffensive, despite the fact that "the display advances religion in a sense," id., at ____, only because its setting and circumstances precluded a finding "of purposeful or surreptitious ... subtle governmental advocacy" of religion. Id.[26/]

Although Everson, Walz and Lynch are troubling, because in a sense each involved direct government support for religion, they

---

26/ This Court's decision in Walz v. Tax Commission, 397 U.S. 664 (1976) represents a somewhat more problematic example of the same distinction. The tax exemption policy at issue in Walz was adjudged constitutional because of the complex interplay of historical and factual circumstances which included the findings that (i) the legislative purpose was clearly "not aimed at establishing, sponsoring, or supporting religion" id., at 674; (ii) religious effects and entanglement would have been more severe if churches did not receive a tax exemption, id., and (iii) the benefit to religion was only one of the "incidental effects" of a general government policy of protecting important nonprofit enterprises -- which included, but were not limited to churches -- from the economic pressures of the marketplace, id., at 676.

can be reconciled with the body of this Court's Establishment Clause jurisprudence insofar as they represent outer limits on the involvement of government and religion. In each case the Court concluded -- notwithstanding some strain on Establishment Clause values -- that the government act in question was designed and implemented with essential neutrality as to religion, and thus constitutionally permissible even though religion was certainly benefited to some extent. However, when that benefit to religion becomes the intended design and effect, as opposed to the incidental consequence, of the government act, then the Establishment Clause prohibitions predominate and the government must be restrained unless there is a specific free exercise right in need of accommodation. To eliminate that free exercise "trigger" would transform accommodation into a vehicle for

permitting the government to endorse and advance religion, or to promote particular religious practices such as prayer, and would thus fatally undermine Establishment Clause values.

The principle of accommodation articulated by this Court is designed to assure that government neutrality does not work to discriminate against religion. It would be an ironic corruption of that delicately conceived doctrine if neutrality were abandoned so that religion could become a favored subject of government regulation.

C. THE ALABAMA MEDITATION-OR-PRAYER STATUTE IS DESIGNED TO ADVANCE A RELIGIOUS PRACTICE, DESPITE THE LACK OF ANY IMPEDIMENT TO THE FREE EXERCISE OF THAT RELIGIOUS PRACTICE

In this case, the Alabama Meditation-or-Prayer Statute is not an appropriate accommodation of religion because, first, Alabama public school students do not suffer any significant impediment to their free

exercise right to pray silently. And second, the Meditation-or-Prayer Statute was designed, not to achieve neutrality through accommodation, but rather to endorse religious values and promote the religious practice of prayer.

It is apparently undisputed that, even without the Meditation-or-Prayer Statute, every student always has the right to pray silently whenever the student so chooses (see Br. of U.S., at 22-23). Therefore, the Meditation-or-Prayer Statute is clearly not required to promote any Free Exercise right (which is also conceded by the United States; id. at 10); compare, Sherbert, supra, and Yoder, supra.

Moreover, to the extent that the free exercise right to pray silently needed any protection in Alabama, that goal was already accomplished by the Meditation Statute. Every alleged value of a legislatively

mandated moment of silence (see, Br. of U.S., passim),[27] was already in place before the legislature amended the Meditation Statute in order specifically to endorse "prayer."

Furthermore, the evidence is overwhelming that the Alabama Meditation-or-Prayer Statute was designed and enacted in order to announce the state's endorsement and promotion of religion in the public school, and not to achieve neutrality through the accommodation of religion.

Not only are the defendant Governor's admissions clear, specific and binding,[28]

---

[27] Silence certainly has an important place in the classroom, when invoked by the teacher to best suit the educational and introspective needs of the students. However, when the legislature mandates silence, for a specified period and at the same time every day, the alleged benefits cannot survive close analysis (see discussion infra), and in fact suggest the legislature's sectarian purposes.

[28] The admissions contained in the appellant Governor's Answer are detailed supra. (See J.A. 21 and 37.) That Answer was filed by then Governor Fob James. The present Governor, George Wallace, was (footnote continued)

but Alabama's enactment of the Meditation-or-Prayer Statute, notwithstanding the preexisting, and still effective, Meditation Statute, could not be more telling: The only point of the Meditation-or-Prayer Statute was to add, advance and endorse "prayer."[29/]

In addition, although transcripts of the Alabama legislature's consideration of the Meditation-or-Prayer Statute are not

---

automatically substituted as a defendant by operation of Rule 25(d), Fed. R. Civ. P., and he is necessarily bound by the admissions of his predecessor.

29/ The statutes differ in two other minor respects as well. First, the Meditation Statute applies only to the first six grades of public school, while the Meditation-or-Prayer statute applies to all grades. Obviously, if the legislature's only goal were to extend the meditation requirement to all grades, that could have been accomplished by simple amendment and without enacting an entirely new statute adding religious references.

Second, the Meditation Statute is mandatory, while the Meditation-or-Prayer Statute is permissive. Once again, this change could have been achieved by simple amendment if that were the legislators' only intent.

available, two other indicators of those proceedings reliably reveal the legislature's exclusively religious purposes: first, the Statement of Senator Holmes which was apparently accepted without dissent and is part of the legislative record (J.A. 50); and, second, the testimony of Senator Holmes to the effect that the statute had a religious purpose, but no secular purpose (J.A. 43-57).

Finally, the conclusion that the Meditation-or-Prayer Statute was designed to advance religion is buttressed by the lack of any factual evidence that it was meant to achieve any other, secular purpose. See, Note, The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools, 96 Harv. L.R. 1874 (1983)(hereinafter "Harv. Note"), at 1881.

Thus, because of that singular religious purpose, in the absence of any burden

to free exercise rights, the statute should be held unconstitutional.[30] The attempt to characterize this statute as an act of religious neutrality, reflecting Alabama's respect for the secular values of silent introspection, is a *post hoc* fabrication

---

[30] It is just that religious design of the Meditation-or-Prayer Statute that distinguishes the Alabama program from the New York released-time program upheld in *Zorach* v. *Clausen*, *supra*, which the United States relies on so heavily (Br. of U.S., at 13).

As the *Zorach* Court pointed out, that case was unlike its predecessor, *McCollum* v. *Board of Education*, *supra*, because in *McCollum* "the classrooms were used for religious instruction and the force of the public school was used to promote that instruction." 343 U.S. at 315 (emphasis added). As Justice Brennan later explained, the decisive difference between *McCollum* and *Zorach* was that the *McCollum* program, by "lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids." *Abington School District* v. *Schempp*, *supra*, at 263 (Brennan J., concurring).

Similarly, here, the authority of the government is used to promote prayer, and that effort is unconstitutional for the same reason. Here, too, the force of government is brought to bear on public school students in the public school classroom to promote religion and prayer.

without any evidentiary support whatsoever. Therefore the Meditation-or-Prayer Statute cannot be justified under the accommodation doctrine.

II

THE COURT OF APPEALS CORRECTLY DECIDED THAT THE ALABAMA MEDITATION-OR-PRAYER STATUTE VIOLATES THE ESTABLISHMENT CLAUSE

The scrupulous separation of church and state is nowhere more important, and has been nowhere more vigorously enforced, than in our nation's public schools. See e.g., Engel v. Vitale, supra; School District of Abington Township v. Schempp, supra; Karen B. v. Treen, supra; and McCollum v. Board of Education, supra. The reasons this Court has applied that strict scrutiny in the public school context -- the impressionability of young children, the compulsory attendance laws that make them a captive audience, the historical impulse to incul-

cate majoritarian religious values, the strong parental interest in religious education and the role of the public schools as exemplars of our democratic ideals -- have been too frequently explained to require elaboration here. See e.g., School District of Abington Township v. Schempp, supra, at 230, et seq. (Brennan J., concurring).

Applying that rigorous scrutiny to the revealing factual record in this case, this Court should hold that the Alabama Meditation-or-Prayer Statute violates the Establishment Clause because of its impermissible purposes and effects.[31] See,

---

[31] Amici make no claim of "administrative entanglement." And we do not address "political divisiveness" as a separate indicia of entanglement, Lemon v. Kurtzman, supra, at 622, because of this Court's admonition that it is not an independent measure of unconstitutionality. Lynch, supra, at ___.

However, cases such as this -- the public school church-state controversies, in particular -- demonstrate that "political divisiveness" is an acute element of Establishment Clause concern, and suggest that the Court should reconsider the independent significance of political divisiveness in Establishment Clause jurisprudence.

Harv. Note; Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N.Y.U.L.R. 364 (1983) (hereinafter "N.Y.U Note").

A. THE PURPOSE OF THE ALABAMA MEDITATION-OR-PRAYER STATUTE WAS TO ADVANCE, AND EXPRESS ENDORSEMENT OF, RELIGION

It is now well established that a state statute violates the Establishment Clause if (among other things) its predominant purpose is to advance religion. Lemon v. Kurtzman, supra; Stone v. Graham, 449 U.S. 39 (1980). That so-called purpose-test -- which this court recently reaffirmed as a constitutional standard in Lynch v. Donnelly, supra -- was significantly amplified by Justice O'Connor in her concurring opinion in that case: "The proper inquiry under the purpose prong of Lemon, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion." Id., at ___. Justice

O'Connor's analysis is especially important in the context of the public schools, where the captive children are particularly susceptible to the message of religious endorsement conveyed by a teacher (see, N.Y.U. Note, at 379), quite apart from whatever "secular purpose" may be devised in support of that message after it is challenged in court.[32/]

The evidence is overwhelming, and unrefuted, that the Alabama Meditation-or-Prayer Statute was enacted in order to

---

32/ In any event, such post hoc rationalizations cannot cure a statute enacted with a constitutionally impermissible purpose. See Lynch v. Donnelly, supra, at ____ (O'Connor concurring)("that [secular purpose] requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes"). See also, e.g., School District of Abington Township v. Schempp, supra, at 223, and Stone v. Graham, supra. Indeed in Stone, this Court held that even the "supposed secular purpose" recited by the legislature itself, in the statute, was not sufficient, id.; whereas in this case, by comparison, the only suggestion of a secular purpose for the Meditation-Or-Prayer Statute comes from the unsworn, self-serving, after-the-fact speculations of counsel.

convey a message of endorsement of religion and promote the religious practice of prayer.[33] (That evidence is described *supra* in considerable detail, and will not be reiterated here.)

Indeed, if the statute is not meant to promote or convey a message endorsing prayer, it would not seem to have any purpose at all. To the extent that silence serves some legitimate, secular, educational function (see, Br. of Gov. Wallace, at 10), teachers and local administrators need no statutory authorization to call for silence in the

---

[33] The appellants, and the United States as amicus, misleadingly suggest that because this case involves only a facial challenge to the statute, there are no relevant facts to consider. (Br. of Gov. Wallace, at 3; Br. of U.S., at 5, n.4). However, although the action may be a facial challenge in the sense of not pertaining to the manner in which it was actually applied to these particular plaintiffs, nonetheless the legislative purposes and intended effects of this particular statute were clearly illuminated by a substantial factual record. Alabama's unconstitutional design is amply revealed by the evidence.

classroom. In fact, as we all know, students are regularly asked to remain silent during study-hall periods, reading periods, frequently before beginning and ending the school day, and whenever necessary to quell a disturbance or give the children an opportunity to make the transition between physical and academic activities. What distinguishes the legitimate educational use of silence is that it is not time-specific, but rather varies from class to class, and from day to day according to the needs of the students and depending on any number of variables affecting the activities, mood and rhythm of the classroom.

That the Meditation-or-Prayer Statute requires a minute of silence only at the <u>beginning</u> of the school day actually underscores its religious purpose, and belies the alleged secular benefits urged in

its support. For example, the United States argues that the Meditation-or-Prayer Statute is of value to students who may find it "embarrassing" to pray in the playground, or who may not be able to pray "during the hustle-bustle of lunch." Br. of U.S., at 23. However, the Meditation-or-Prayer Statute does not provide for silence in the playground or at lunch, but only at the beginning of class each day. Thus, the student who needs to pray during lunch, or at play, is not helped at all by the single minute the statute sets aside for prayer many hours earlier.[34/] Indeed the very fact that the Meditation-or-Prayer Statute provides for the moment of silence just as school begins, and following so closely upon

---

34/ And if that earlier prayer at the beginning of school is a comfort to the child who feels the need for prayer during the hustle-bustle of lunch, then so would a prayer a few minutes earlier still -- when the child was at home, where there would obviously be no Establishment Clause restraints.

the child's many hours at home when the opportunity for prayer and reflection is so freely available, further demonstrates that the purpose of the statute is not to facilitate the needs of the child, but rather to announce the government's endorsement of religion and its policy of promoting prayer in the public schools.

It is certainly clear that if the Alabama statute had provided only for prayer during the minute of silence its impermissible purpose, and its unconstitutionality, would be beyond dispute. (See, Br. of U. S., at 17, n.16.; and Harv. Note, at 1882.) Alabama's purpose is no less unconstitutional because "prayer" is camouflaged in proximity to "meditation," particularly since "meditation" was already required by statute and the only substantive point of enacting Ala. Code §16-1-20.1 was to emphasize that the government intended to

promote "prayer."

Under all the circumstances of this case, it is not surprising that the district court concluded as a matter of fact -- after hearing the testimony of the legislative sponsor, and assessing that witness' credibility as well as the lack of any contrary evidence -- that the Alabama Meditation-or-Prayer Statute had a religious purpose. 544 F.Supp., at 732. And the Court of Appeals properly relied on that finding in concluding that the statute was unconstitutional. 705 F.2d, at 1535-36.

The purpose-test can maintain its viability as a constitutional standard only to the extent this Court realistically undertakes that examination of purpose, not only with due regard for the government's explanations, but also with sensitivity to the perspective of teachers, school administrators and others who will actually

implement those purposes, as well as the religious minorities in the community who must bear the consequences of even well-intentioned, but overreaching purposes.[35/] In that light, it is clear that Alabama's purposes were religious, that the Meditation-or-Prayer Statute is therefore unconstitutional and that the Court of Appeals decision should be affirmed.

35/ This is particularly so in light of how the Court has chosen to deal with the issue of "political divisiveness." See discussion supra. For example, as Justice O'Connor explained:

> "Political divisiveness is admittedly an evil addressed by the Establishment Clause .... But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself." Lynch v. Donnelly, supra, at _____ (concurring opinion; emphasis added).

Thus, unless the court is willing to look at the real "character of the government act," the "evil" of political divisiveness will have become effectively unreviewable and without remedy.

B. THE EFFECT OF THE ALABAMA MEDITATION-OR-PRAYER STATUTE WILL BE TO ADVANCE RELIGION

In addition to prohibiting a statute enacted with a religious purpose, the Establishment Clause prohibits laws whose primary effect is the advancement or inhibition of religion. Lemon v. Kurtzman, supra. Indeed, a statute is just as invalid whether its primary effect is to aid all religions, or only one. Everson v. Board of Education, supra.

Like the purpose-test, discussed infra, the "effects-test" was also reiterated by the Court in its most recent Establishment Clause analysis. Lynch v. Donnelly, supra. However, in his majority decision, the Chief Justice noted that determining whether a government act has the effect of "confer[ing] a substantial and impermissible benefit on religion" is an especially elusive and difficult constitutional judg-

ment. Id., at ____. Once again, Justice O'Connor's concurring opinion in that case suggests a helpful analysis for unraveling that analytical knot by shifting the focus from the effects a government act may have on religion itself, which are necessarily difficult to discern, to "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval" of religion. Id., at ___ (concurring opinion). That question is far more amenable to judicial inquiry.

Amici contend that even when measured by the conventional standard, the Alabama Meditation-or-Prayer Statute has the primary effect of advancing religion, if only because the preexisting Meditation Statute already satisfied whatever interest the state may have had in the non-religious promotion of introspection -- which, of

course, could have included prayer or any other subject a child wished to consider.[36/]

Moreover, in this case, the statute was clearly, indeed openly, enacted in order to advance religion -- to send the message that religion is back in the Alabama public schools. And it is precisely that explicit religious message that will precipitate inevitable religious effects.

A teacher charged with announcing and

36/ Indeed, the fact that the Meditation Statute is mandatory and the Meditation-or-Prayer Statute is permissive will engender a curious uncertainty about how the minute of silence will be administered in each class, and further suggests the unconstitutional effect of the Meditation-or-Prayer Statute. Every teacher (at least in elementary school) "shall announce a minute of silence for meditation." Ala. Code §16-1-20. Some teachers, however, "may announce" a period of silence for meditation or prayer. Ala. Code §16-1-20.1. Obviously, the differences from class to class will make it plainly evident to the students which teachers emphasize prayer, with consequent coercive effects. Moreover, the very fact that a teacher must choose whether to emphasize prayer, or not, tends to implicate the teacher's religious beliefs and force the teacher to make some judgment of religious preferences for the students.

implementing a moment of silence for meditation or prayer, while at the same time maintaining the posture of neutrality demanded by the Establishment Clause, faces a difficult and unenviable task. The pressures in Alabama to include overt religious practices in the public school classroom are substantial,[37] and in fact many teachers -- such

---

[37] One need only consider the factual history involved in this litigation to begin appreciating the magnitude of those pressures:

- the legislature enacted the Governor's School Prayer Statute, Ala. Code §16-1-20.2, notwithstanding the controlling contrary prohibitions of Engel, supra;

- the Jaffree children's teachers conducted vocal, group prayer in their classes, in open defiance of Schempp, supra, and with complete disregard for the Jaffrees' religious convictions and their repeated objections to those prayer practices;

- public school prayer activities are openly conducted throughout Alabama, see e.g. Birmingham Post-Herald, October 16, 1982, without any apparent effort by the state to foster understanding of, and respect for, Establishment Clause restraints;

- after school prayer was enjoined by the district court in this case, the Governor of

(footnote continued)

as the defendant teachers in this case -- may sincerely believe that religion and prayer should be included in the public school curriculum (see, Br. of U.S., at 9). From a teacher's perspective, the differences between the neutral encouragement of introspection, and coercive pressure on a child to pray, may occasionally be subtle indeed. And, of course, more importantly from the child's point of view, coercion is a function not only of the teacher's words, but the manner, emphasis and tone of the teacher's presentation, as

---

Alabama urged public school teachers to disobey that court order, dared the courts to do anything about it, and promised state support for any teacher who was subjected to contempt proceedings as a result. Birmingham Post-Herald, September 27, 1982.

Indeed, even the United States acknowledges, and undoubtedly understates, "the apparent hostility of some of Alabama's legislators to this Court's decisions in Schempp and Engel" (Br. of U.S., at 21). And if that hostility is "apparent" to the government's lawyers in Washington, it must be all the more strikingly evident to the people of Alabama.

well. See, Harv. Note, at 1889.

In such trying circumstances, the proper implementation of a period of silence for meditation or prayer cannot possibly be accomplished without the sensitive understanding of the teacher, coupled with the supportive assistance and counsel of school administrators. However, where the admittedly popular desire for public school prayer is fueled by the government's flagrant contempt of the Establishment Clause, and where government officials are promoting religion in the public schools rather than assisting teachers to achieve the appropriate neutrality, then the theoretical secular benefits of the Meditation-or-Prayer Statute -- toleration, pluralism, voluntariness (see Br. of U.S., passim) -- will certainly be overwhelmed by sectarian influences in the classrooms of Alabama.

If the United States were correct (Br.

of U.S., at 9) that a minute of silence is the delicate middle between the prohibitions of the Establishment Clause, and the desire by many for vocal, group prayer in the public schools, then the state would have to help its people understand the need for and delicacy of that middle ground, or destroy it. Alabama's destructive choice is all too regrettably apparent: Rather than facilitating the public appreciation of the constitutional need to accept silence as an alternative to government-sponsored prayer, the government enacted the Meditation-or-Prayer Statute in order to provide for government-sponsored prayer. And the religious sentiments of state leaders that prompted the Meditation-or-Prayer legislation will undoubtedly dictate how it is implemented -- such is the power of the example government sets.

Therefore, even under traditional

"effects-test" analysis, the Alabama Meditation-or-Prayer Statute would have a greater effect in advancing religion than, for example, the nativity scene display considered in Lynch, because in Lynch there was "insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." Id., at ____. In Alabama, by contrast, the purposeful religious effort was anything but surreptitious and the governmental advocacy of religion could not be more obvious.

Finally, when the facts of this case are measured against the "effects" standard suggested by Justice O'Connor, the unconstitutionality of the Alabama Meditation-or-Prayer Statute is all the more apparent. Given the history of this one litigation (see discussion supra), not to mention the

broader public context of the church-state controversy in Alabama,[38] it is unquestionably apparent that the Meditation-or-Prayer Statute was specifically intended to, and in fact does "have the effect of communicating a message of government endorsement ... of religion." Lynch, supra, at ___ (concurring opinion). If that standard is to be a meaningful indicator of excessive church-state involvement, then it must be applied with a realistic assessment of the government's message, and a sensitive appreciation of the consequences of that

---

[38] Even the appellants recognize the prevalance of "religious factionalism" in Alabama and throughout the country. Appellant Wallace Jurisdictional Statement, No. 83-812, at 26. "Today, the flame of religious zeal is everywhere in evidence in matters that are also political." Id.

The appellants contend that such "factionalism" and "religious zeal" warrant diminishing Establishment Clause restraints, whereas we suggest just the opposite: that such religious zeal virtually assures that a statute such as the Alabama Meditation-or-Prayer Statute will have a religious effect in its implementation and that it will inject that factionalism into the classroom where we, as a people, can least afford its divisive consequences.

communication throughout the community. Measured against that standard, the Alabama Meditation-or-Prayer Statute is surely constitutionally deficient.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

September, 1984

Respectfully submitted,

JACK D. NOVIK
(Counsel of Record)
BURT NEUBORNE
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

JOHN SEXTON
New York University Law School
40 Washington Square South
New York, NY 10012
(212) 598-3450

EDWARD STILL
Alabama Civil Liberties Union
Suite 400, Commerce Center
2027 First Avenue N.
Birmingham, AL 35203,
(215) 322-6631

NATHAN Z. DERSHOWITZ
National Coalition for
Public Education and
Religious Liberty
Dershowitz and Eiger
225 Broadway
New York, NY 10007
(212) 513-7676

Counsel for Amici